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## **Proposals to Amend the Senate Cloture Rule**

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# Proposals to Amend the Senate Cloture Rule

## Summary

Paragraph 2 of Senate Rule XXII, also known as the “cloture rule,” was adopted in 1917. It established a procedure, amended several times over the intervening years, by which the Senate may limit debate and act on a pending measure or matter. Aside from unanimous consent agreements, cloture is the only way the Senate can limit debate.

Recently, concern by some Senators over an inability to halt consideration and obtain a confirmation vote on several pending judicial nominations has led to a renewed interest in amending the Senate cloture rule. One option, called the “nuclear option” by some and the “constitutional” option by others, would seek to use a ruling by the presiding officer or a majority vote of the chamber to end debate outside of the terms of Rule XXII. It is possible that this option may be attempted in the 109<sup>th</sup> Congress.

Several measures were introduced in the 108<sup>th</sup> Congress to amend the cloture rule. S.Res. 138, which was introduced by Senate Majority Leader Bill Frist, would have established a diminishing threshold for invoking cloture on presidential nominations that were subject to Senate approval. S.Res. 85, which was introduced by Senator Zell Miller, would have applied the same idea to all Senate business, with the exception of amendments to the Senate’s standing rules. A third proposal, S.Res. 249, also authored by Senator Miller, called for the elimination of the cloture rule altogether.

This report provides a brief history of the Senate cloture rule, outlines past and present proposals to amend it, and presents arguments both in support of, and in opposition to, the Senate’s tradition of unlimited debate.

This report will be updated as events warrant.

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# Proposals to Amend the Senate Cloture Rule

## Brief History of the Cloture Rule

Proposals to limit Senate debate are as old as the Senate itself. Over the 216-year history of the body, numerous procedures have been proposed to allow the Senate to end discussion and act.<sup>1</sup> The most important debate-limiting procedure enacted was the adoption in 1917 of the “cloture rule,” codified in paragraph 2 of Senate Rule XXII. Under the current version of this rule, a process for ending debate on a given measure or matter may be set in motion following a super-majority vote of the Senate.

Since the Senate’s adoption of the cloture rule in 1917, proposals have been advanced to repeal or amend it in almost every session of Congress.<sup>2</sup> At times, Senators of both political parties, as well as the parties themselves, have debated the merits of the Senate’s tradition of free and unlimited debate and argued for and against making cloture easier to invoke. These debates occurred at different times and under different sets of circumstances, for example, as Senators attempted to prevent filibusters of civil rights measures, pass consumer protection legislation, or secure the confirmation of judicial or executive branch nominations.

Debates on the cloture rule have frequently focused on whether or not the Senate must consider amendments to it under the body’s existing rules, including Rule XXII itself. This argument rests on the principle that the Senate is a “continuing body” which regards its rules as staying in force from one Congress to the next. A contrary argument contends that this principle has the effect of “entrenching” the existing rules against change, a situation which amounts to an unconstitutional limit on the power of the body to set the terms of its own operation. To overcome these difficulties, Senators attempting to change Rule XXII have employed various procedural tactics, including seeking to invoke cloture by majority vote, seeking opinions by the Vice President acting as presiding officer that the cloture rule itself is unconstitutional, and arguing that the rules do not apply on the first day of a Congress.

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<sup>1</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States*, committee print, prepared by the Congressional Research Service, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1975), p. 61.

<sup>2</sup> U.S. Library of Congress, Congressional Research Service, *Limitation of Debate in the United States Senate*, by George B. Galloway, (Washington: December, 1956), p. 5; U.S. Congress, Senate, *Debate in the United States Senate: Extracts from the Journal of the United States Senate Pertaining to Limitation of Debate in the Senate of the United States*, (Washington: GPO: 1917), pp. 1-10.

Although many attempts have been made to amend paragraph 2 of Rule XXII, only six amendments have been adopted since the cloture rule was enacted in 1917: those undertaken in 1949, 1959, 1975, 1976, 1979 and 1986. Each of these changes was made within the framework of the existing or “entrenched” rules of the Senate, including Rule XXII.<sup>3</sup>

In 1949, the cloture rule was amended to apply to all “matters,” as well as measures, a change which expanded its reach to nominations, most motions to proceed to consider measures and other motions. A decade later, in 1959, its reach was further expanded to include debate on motions to proceed to consider changes in the Senate rules themselves. The threshold for invoking cloture was lowered in 1975 from two-thirds present and voting to three fifths of the full Senate except on proposals to amend Senate Rules. In a change made in 1976, amendments filed by Senators after cloture was invoked were no longer required to be read aloud in the chamber if they were available at least 24 hours in advance.<sup>4</sup>

In 1979, Senators added an overall “consideration cap” to Rule XXII to prevent so-called post-cloture filibusters, which occurred when Senators continued dilatory parliamentary tactics even after cloture had been invoked. In 1986, this “consideration cap” was reduced from 100 hours to 30 hours to meet the demands of a modern Senate whose proceedings were televised nationally.

## Features of the Present Cloture Rule

In its current form, which was adopted in 1986, Rule XXII provides that a cloture motion must be signed by 16 senators and presented on the Senate floor. One hour after the Senate meets on the second calendar day after a cloture motion has been filed and after a quorum has been ascertained, the presiding officer puts the question, “Is it the sense of the Senate that the debate shall be brought to a close?” The cloture motion is then subject to a ye-a-and-nay vote.

If three-fifths of Senators — 60 if there are no vacancies in the body — vote for the cloture motion, the Senate must take final action on the matter on which it has invoked cloture by the end of 30 total hours of additional consideration. Invoking cloture on a proposal to amend the Senate’s standing rules requires a higher threshold, approval by two-thirds of the Senators present and voting, or 67 senators if there are no vacancies and all Senators vote. Once cloture has been invoked, the clotured matter remains the pending business of the Senate until it is disposed of and no Senator may speak for more than one hour. Senators may yield all or part of their allotted hour to a floor manager or floor leader, who may then yield time to other Senators. Each floor manager and leader, however, can have no more than two hours

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<sup>3</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, 99<sup>th</sup> Cong. 1<sup>st</sup> sess. (Washington: GPO, 1985), pp. 15-16.

<sup>4</sup> *Ibid.*, pp. 123-124.

in total yielded to him or her. As with most Senate procedures, any of these requirements may be waived by unanimous consent.

After cloture has been successfully invoked, no dilatory amendments or motions are permitted, and all debate and amendments must be germane. Only amendments filed before the cloture vote may be considered, and Senators may not call up more than two amendments until every other Senator has had an opportunity to do likewise. Printed amendments that have been available for at least 24 hours are not read when called up.

Time for votes, quorum calls, and other actions is charged against the 30-hour limit on consideration. This time limit may be extended by joint leadership motion if three-fifths of all senators vote for a non-debatable motion to do so. Senators who have not used or yielded ten minutes of their hour are guaranteed up to ten minutes to speak. When all time expires, the Senate immediately votes on any pending amendments and then on the underlying matter.<sup>5</sup>

## Proposed Changes to Cloture Procedure

Concern by some Senators over an inability to halt debate and obtain a confirmation vote on several pending judicial nominations led to a renewed interest in the 108<sup>th</sup> Congress and the 109<sup>th</sup> Congress in amending the Senate cloture rule. In the 108<sup>th</sup> Congress several resolutions were introduced on the subject. Proposals currently under discussion include:

### The “Nuclear” or “Constitutional” Option<sup>6</sup>

Media reports have focused on the possible use of what has been called a “nuclear” parliamentary option to end debate and vote on certain stalled nominations.<sup>7</sup> Under such a scenario, the chair, perhaps occupied by the Vice President serving as Presiding Officer or by the President Pro Tempore of the Senate, would set aside the existing provisions of Rule XXII and rule that cloture could be invoked by simple majority vote. Supporters of such an approach argue that if such a ruling were appealed by opponents or submitted to the Senate for decision, and then sustained by a majority vote, debate would end and the pending business could then be brought to a vote. In another version of this scenario, a Senator might raise a constitutional point of order against the decision that cloture had not been invoked on a matter, and the same end achieved if the point of order were sustained by a

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<sup>5</sup> CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

<sup>6</sup> For more information, see CRS Report RL32684, *Changing Senate Rules: The “Constitutional” or “Nuclear” Option*, by Betsy Palmer.

<sup>7</sup> Geoff Earle, “‘Nuclear’ Option Retained to Break Filibuster,” *The Hill*, June 25, 2003, p. 1. Mike Allen, “GOP Plans ‘Marathon’ On Judges; Debate to Spotlight Blocked Nominees,” *The Washington Post*, Nov 8, 2003. p. A.01. Charles Hurt, “Senate GOP Fuzzy on Tactics to Handle Judicial Filibusters; Frist Dodges ‘Nuclear Option’ Query,” *The Washington Times*, Sept. 7, 2003. p. A.06.

majority vote of Senators. Supporters argue that this proceeding would be permissible because under the Constitution, the Senate has the express right to make, or change, the rules of its proceedings at any time. They further point out that such constitutional questions are traditionally submitted to a vote of the full chamber for decision.<sup>8</sup> Under this latter scenario, however, the chair would likely have to also ignore the precedent that constitutional questions are debatable, perhaps by stating that the body has a right to “get to the question” at hand.

Those concerned about the filibuster of judicial nominations have also argued that the inability of the Senate to reach a final vote on a nomination represents an abdication of the Senate’s duty to perform a constitutional duty, that of advising and consenting to nominations.

Majority Leader Bill Frist told his Senate colleagues on January 4, 2005, that he was willing to take steps to use one of the “nuclear” or “constitutional” options in the 109<sup>th</sup> Congress, if he felt it was necessary.

So let me say this: If my Democratic colleagues exercise self-restraint and do not filibuster judicial nominees, Senate traditions will be restored. It will then be unnecessary to change Senate procedures. Self-restraint on the use of filibuster for nominations — the very same self-restraint that Senate minorities exercised for more than two centuries — will alleviate the need for any action. But if my Democratic colleagues continue to filibuster judicial nominees, the Senate will face this choice: Fail to do its constitutional duty or reform itself and restore its traditions, and do what the Framers intended. Right now, we cannot be certain that judicial filibusters will cease. So I reserve the right to propose changes to Senate Rule XXII and do not acquiesce to carrying over all the rules from the last Congress.<sup>9</sup>

Opponents have used the term “nuclear” to describe these scenarios because of their belief that its use would destroy the comity and senatorial courtesy necessary in a body that operates largely by unanimous consent. They further argue that such an approach might destroy the unique character of the Senate itself, making it more like the House of Representatives, where a majority has the ability to halt debate any time it wishes.<sup>10</sup>

Observers point out that such a parliamentary proceeding is not unprecedented. On several occasions, Vice Presidents acting as presiding officer, including Vice Presidents Richard Nixon, Hubert Humphrey and Nelson Rockefeller, offered advisory opinions from the chair that the provisions of Rule XXII can be changed by a majority vote of the Senate at the beginning of a Congress.<sup>11</sup> In 1975, a ruling to

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<sup>8</sup> Chuck Lindell, “GOP Girds for Filibuster War; Senators Threaten to Use Last Resort to Clear Judicial Nominees,” *Austin American Statesman*, Nov. 9, 2003, p. A1.

<sup>9</sup> Senator Frist, remarks in Senate, *Congressional Record*, daily edition, vol. 150 (Jan. 4, 2005), p. S14.

<sup>10</sup> *Ibid.*

<sup>11</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule*, (continued...)

this effect, submitted to the chamber by Vice President Nelson Rockefeller, was sustained by a vote of the Senate.<sup>12</sup> The Senate later reversed itself by recorded vote, but whether this obliterated the precedent permitting cloture by majority vote has been a source of disagreement. For example, Senator Robert C. Byrd, the architect of the 1975 cloture amendment, observed that the reversal vote “erased the precedent of majority cloture established two weeks before, and reaffirmed the “continuous” nature of Senate rules.”<sup>13</sup> Others argued that such a precedent was established and was not overturned. Senator Walter F. Mondale observed, “...the Rule XXII experience was significant because for the first time in history, a Vice President and a clear majority of the Senate established that the Senate may, at the beginning of a new Congress and unencumbered by the rules of previous Senates, adopt its own rules by majority vote as a constitutional right. The last minute votes attempting to undo that precedent in no way undermine that right.”<sup>14</sup>

## Frist Proposal

In the 108<sup>th</sup> Congress, Senator Frist introduced another proposal to amend the cloture rule. His resolution (S.Res. 138) would have added a new section to the end of Rule XXII, and created a cloture process applicable only to the confirmation of nominees. Any nomination requiring Senate confirmation would have been subject to this new procedure, including nominees to the U.S. Supreme Court, the U.S. Court of Appeals, District Courts, members of the President’s cabinet, and lower-level agency executives.<sup>15</sup>

As under the current rule, the new cloture procedure envisioned by Senator Frist’s S.Res. 138 would have begun with the filing of a written cloture petition that contains the signatures of 16 Senators, which would lie over before being considered on the following calendar day plus one. Under S.Res. 138, however, the number of votes needed to invoke cloture on a nomination would have diminished steadily over time.

Under the procedure proposed by Senator Frist, as with current practice, the first cloture petition filed on a nomination would need the votes of 60 Senators for cloture to be invoked. If 60 Senators did not vote for cloture, a second petition could then be submitted. When the Senate voted on that petition, just 57 Senators would be

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<sup>11</sup> (...continued)

*Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, 99<sup>th</sup> Cong. 1<sup>st</sup> sess. (Washington: GPO, 1985), pp. 23-32.

<sup>12</sup> David Miller, “Panel OK’s Measure that Would Change Rules For Approving Judicial Nominees,” *CQ Committee Coverage*, June 24, 2003.

<sup>13</sup> Robert C. Byrd, *The Senate, 1789-1989, Addresses on the History of the United States Senate*, vol. 2 (Washington: GPO, 1991), p. 132.

<sup>14</sup> Walter F. Mondale, “The Filibuster Fight,” *The Washington Post*, Mar. 18, 1975, p. A16.

<sup>15</sup> For more information on nominations needing Senate confirmation, see CRS Report RL31346, *Presidential Appointments to Full-time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.



required to invoke cloture. On the third petition, the required vote would fall to 54 Senators, and on a fourth petition the votes of 51 Senators would invoke cloture. The cloture threshold would never drop below a majority vote of the full Senate. As with current cloture procedure, there would be no guarantee that the Senate would actually debate the nomination during the time that the cloture petitions must lay over. Instead, as is current practice, the Senate could chose to consider other measures or matters.

Senator Frist's proposal was similar to a proposal to amend Rule XXII offered in 1995 by Senators Tom Harkin and Joseph I. Lieberman. Under that proposal, the majority required to close debate on all measures on the executive and legislative calendars (not just nominees as in the Frist proposal) would decline on successive cloture votes from 60, to 57, to 54, and finally to 51.<sup>16</sup> Additionally, the Frist resolution would have prohibited the filing of a further cloture petition on a nomination until the Senate had disposed of other pending cloture motions on that nomination. Currently, cloture petitions can be filed on successive days, or even on the same day, without first disposing of the previous petition. In addition, the Frist resolution would have required that no cloture petition be filed until a nomination had been pending in the Senate for 12 hours.

The Senate Committee on Rules and Administration held a hearing on the Frist resolution on June 5, 2003 and ordered the resolution reported by voice vote on June 24.<sup>17</sup> On November 12, 13 and 14, 2003, the Senate debated the Frist resolution and cloture motions on several judicial nominations for a period of 40 hours.<sup>18</sup>

Supporters of Senator Frist's resolution have argued that extended debate in the Senate is particularly troubling when it comes to presidential nominations. John C. Eastman, constitutional law professor at the Chapman University School of Law, told the Senate Rules and Administration Committee on June 5 that inherent in the Constitution is the requirement that nominations be confirmed only by majority vote. "The advice and consent role envisioned by the Constitution's text," Eastman argued, "is one conferred on the Senate as a body, acting pursuant to the ordinary principle [sic] of majority rule."<sup>19</sup> Because it takes 60 votes to invoke cloture, the process of filibustering a nomination is inherently unconstitutional,<sup>20</sup> he argued.

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<sup>16</sup> Text of S.Amdt. 1, *Congressional Record*, vol. 141 (Jan. 4, 1995), pp. 434-435.

<sup>17</sup> Press reports indicate that no Democrats were present at the meeting. See John Cochran, "Senators Uneasy with Proposal to Alter Filibuster Rule on Judicial Nominations," *CQ Weekly*, vol. 61 (June 28, 2003), p. 1605.

<sup>18</sup> *Congressional Record*, daily edition, vol. 149 (Nov. 12, 2003), p. S14528.

<sup>19</sup> Testimony of Professor Eastman, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/060503Eastman.htm>], visited Feb. 14, 2005.

<sup>20</sup> For a broader discussion of constitutionality, see CRS Report RL32102, *Constitutionality of a Senate Filibuster of a Judicial Nomination*, by Jay R. Shampansky.

Supporters of the Frist resolution contend that the filibuster of nominations takes power away from the President. “Obstructionist delay in the consideration of either executive or judicial nominations harms the separation of powers,” said Douglas W. Kmiec, Dean of The Catholic University of America School of Law. “There is a constitutional duty to provide timely advice and consent on judicial nominees.”<sup>21</sup>

While there are other avenues for a Senator trying to get a bill that is being filibustered through the process (such as by amending some other measure or with the aid of a House colleague), Senator Frist noted, there is no other way to have a nomination confirmed except by a vote of the full Senate. “There is no safety valve. Filibustering nominations is filibustering in its most potent and virulent form, and even if a majority of Senators stand ready to confirm, such filibusters can be fatal,” he said.<sup>22</sup>

Those who oppose the Frist resolution argued that it would tilt the balance of power too heavily toward the President in the nomination and confirmation process. They also maintained that there is not enough evidence of a problem to merit changing one of the basic features of the Senate, the potential for unlimited debate. Finally, they asserted that such a change could challenge the Senate’s ability to exercise its constitutional and institutional right to independently assess the qualifications of nominees.

“If we cede power to the President, I don’t think we’ll ever get it back,” said Christopher J. Dodd, ranking Democrat on the Senate Rules Committee at the June 5 hearing. “[The Frist] resolution ... would fundamentally undermine the Senate’s role in our constitutional democracy, cede enormous powers to the Executive and upset the deliberate system of checks and balances intended by the Framers.”<sup>23</sup> Senator Dodd noted that the bulk of President George W. Bush’s nominees have been confirmed, pointing out that in the 107<sup>th</sup> Congress, President Bush submitted 347 nominations, of which 297 were confirmed, two were withdrawn and 48 were returned to him.<sup>24</sup> During the 106<sup>th</sup> Congress, President William Jefferson Clinton submitted 136 nominations and made 18 recess appointments to full-time positions

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<sup>21</sup> Testimony of Dean Kmiec, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/060503Kmiec.htm>], visited Feb. 14, 2005.

<sup>22</sup> Testimony of Senator Frist, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/06050>], visited Feb. 14, 2005.

<sup>23</sup> Testimony of Senator Dodd, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/06050>], visited Feb. 14, 2005.

<sup>24</sup> CRS Report RL31346, *Presidential Appointments to Full-time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.

requiring Senate confirmation. The Senate confirmed 108 nominations and returned 24; the President withdrew four nominations.<sup>25</sup>

“Our paramount and overriding concern should be to protect the role of the Senate under the Constitution,” argued Senator Edward M. Kennedy. “Under the [Frist] proposal now before us, the number of votes required to terminate debate on nominations would be reduced from 60 to 51. A simple majority of the Senate would be able to end debate, and the Senate would put itself on a course to destroy the very essence of our constitutional role.” The proposal, “would inevitably lead to pressure to make the same change for ending debate on legislation.”<sup>26</sup>

William and Mary law professor Michael J. Gerhardt testified that a filibuster of a nominee does not completely block the President from filling the vacancy at issue, pointing out that the President can fill the seat by making a recess appointment, which would not require Senate confirmation (although the office would be filled only until the end of the next session) or appointing an acting official under the Federal Vacancies Reform Act.<sup>27</sup>

## Miller Proposals

Two other proposals to amend the cloture rule were introduced in the 108<sup>th</sup> Congress by Senator Zell Miller. Senator Miller introduced a resolution (S.Res. 85) that would have altered the cloture procedure for all measures, motions, or matters to come before the Senate. The new process was identical to that proposed by Senator Frist in S.Res. 138, except where the Frist resolution would have applied only to presidential nominations, Senator Miller’s proposal to have a gradually declining threshold for invoking cloture would have applied to all Senate business except changes to the Senate’s standing rules. Changes to the standing rules would have still required the votes of two-thirds of those present and voting to stop debate.

On October 22, 2003, Senator Miller introduced a second resolution (S.Res. 249) that would delete paragraph 2 of Rule XXII entirely. Senator Miller argued that by removing provisions within Senate rules for invoking cloture, it would then require a simple majority to end a filibuster.<sup>28</sup> The cloture rule, however, is the only

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<sup>25</sup> CRS Report RL30524, *Presidential Appointments to Full-Time Positions in Executive Departments During the 106<sup>th</sup> Congress, 1999-2000*, by Rogelio Garcia.

<sup>26</sup> Testimony of Senator Kennedy, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/06050>], visited Feb. 14, 2005.

<sup>27</sup> Testimony of Professor Gerhardt, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/060503Gerhardt.htm>], visited Feb. 14, 2005.

<sup>28</sup> Editorial, “‘Piracy’ Allows The Minority To Rule In U.S. Senate,” *Tampa Tribune*, Oct. 27, 2003, p. A12.

mechanism by which debate can be stopped in the United States Senate.<sup>29</sup> Before the cloture rule was enacted in 1917, it was not possible to stop debate without achieving unanimous consent.

## Statutes and Standing Orders

Another option that has been suggested is to establish procedures to limit debate by means other than changing Senate standing rules.<sup>30</sup> One example of this might be to amend the standing orders of the Senate, instead of its standing rules. Another possible example of such an approach would be to pass an expedited procedure statute. Expedited procedure statutes, often called “fast track” statutes, are laws that establish special procedures for the consideration of measures in one or both chambers of Congress. These laws frequently mandate timely floor scheduling, limit time for committee consideration, floor debate, and amendment, and establish mandatory ‘hookup’ procedures to ensure that both chambers act on the same measure.<sup>31</sup> Numerous expedited procedure statutes are currently in effect and act as the equivalent of standing rules of the House and Senate, including such well-known examples as the Congressional Budget Act, the War Powers Act, the Nuclear Waste Policy Act, the Trade Act of 1974 and the Congressional Review Act, by which the Senate can vote on resolutions to disapprove proposed agency regulations.<sup>32</sup>

A potential advantage of an expedited procedure statute is that it presumably would only require 60, rather than, 67 Senators normally required to invoke cloture on such a proposal. This would presumably also apply to amendments to the Senate’s standing orders. This is because the special provision for cloture on rules proposals is understood to apply only to amendments to the standing rules.

By relying on statute, provisions of this type might be passed as a freestanding measure, or attached to another piece of legislation. If supporters thought it aided them, an expedited procedure statute limiting debate might even originate in the House of Representatives where they could be attached by special rule to one or more pieces of ‘must pass’ legislation, creating momentum for their consideration in the Senate.

Why would it be appropriate for procedures governing nominations to be placed in statute? Supporters might argue that it is precisely because they deal with a power in which both the legislative and executive branches of government are involved. Such an approach might also offer proponents political arguments over attempts to change standing Senate rules. For example, supporters might argue, “If it is the law that the Senate must vote on disapproving government regulations on arcane subjects

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<sup>29</sup> CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

<sup>30</sup> John Cochran, “Lott Has a Better Idea to Stop Senators From Anonymously Blocking Bills and Nominations,” *CQ Today*, July 9, 2003.

<sup>31</sup> CRS Report RL30599, *Expedited Procedures in the House: Variations Enacted Into Law*, by Christopher M. Davis.

<sup>32</sup> CRS Report RS20234, *Expedited, or “Fast Track” Legislative Procedures*, by Christopher M. Davis.

like migratory birds or the content of upholstered furniture, shouldn't it be the law of the land that something as important as nominations for our federal courts receive an up or down vote?"

Opponents of using expedited procedures or changes in the standing orders might argue that it violates the spirit of Senate tradition by changing Senate rules outside the regular process for amending them. Opponents might also argue that while expedited procedures are fine for a few individual pieces of legislation or functions, such as disapproving agency regulations, they are not appropriate for an important constitutional function like the confirmation of presidential nominees.

## **Additional Proposals to Limit Senate Debate**

In its 214-year history, numerous proposals have been put forth to limit Senate debate.<sup>33</sup> These include the following:

- amending Rule XXII to provide for cloture by majority vote;
- adopting a rule providing for the use of a motion for the previous question, of the type used in the U.S. House of Representatives to end debate;
- adopting a rule that debate and amendment must be germane to the subject under consideration, either to all business at all times, or only to specific business or only at limited times. (For example, to appropriations and revenue bills, or in the closing days of a congressional session.);
- limiting the duration of debate by special rule, as in the House;
- enforcing the existing rules of the Senate by requiring a speaking Senator to stand and not sit or walk around;
- enforcing the rule that “no Senator shall speak more than twice upon any one question in debate on the same day without leave of the Senate, which shall be determined without debate”;
- taking a Senator “off his feet” for using unparliamentary language;
- making a point of order against frequent quorum calls that no business has intervened since the last roll call;
- having the chair rule against dilatory motions on points of order raised from the floor;
- objecting to the reading of papers;
- enforcing the provision of Jefferson’s Manual that “No one is to speak impertinently or beside the question, superfluously, or tediously;”
- letting the chair reverse the precedent, established in 1872, that Senators may not be called to order for irrelevancy of debate;
- letting the chair make use of the power of recognition;
- letting there be objection to yielding, even though the Senator who has the floor consents to an interruption; and

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<sup>33</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States*, committee print, prepared by the Congressional Research Service, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1975), p. 61.

- resorting to prolonged or continuous sessions to make it more difficult on those who want to stage a filibuster.

## Arguments in Support of Extended Debate<sup>34</sup>

### Minority Rights

It is a key safeguard of the American system of government that the Senate so strongly protects the rights of a block of Senators who do not command a majority (51). Supporters of this argument believe that legislative minorities have rights which no majority should be able to easily override. Further, they argue, obstruction is justified to prevent a majority from trampling upon the rights of a minority until a broad political consensus has developed on an issue. The structure of the Senate was intended to protect the rights of smaller states, and it is asserted that such a change would undermine this intent.

### No Harm

Defenders of extended debate also contend that, in the long run, matters that are truly in the nation's best interest have not been permanently blocked by extended debate. Nearly every important bill blocked by a filibuster, they maintain, eventually has been enacted and those bills which ultimately failed because of an extended debate would have been bad for the country. Likewise, the Senate's tradition of debate has protected both political parties at different times in history. The cloture rule has been in effect for nearing 100 years with little ill effect, they contend.

### Unique Role

Supporters of extended debate believe that the ability of any Senator to speak at length about virtually any topic at any time is a unique characteristic of the Senate which allows the chamber to play a vital role in the legislative process, cooling passions and forcing deliberation. Furthermore, supporters argue, this feature was one that was intended by the Framers, differentiating the Senate from the House. Removed of this deliberative function, the Senate would become a shadow of the larger House of Representatives, they say. In addition, because the Senate alone has the right to act on executive business, nominations and treaties, the function of extended debate can act as a check on the executive branch.

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<sup>34</sup> Several arguments from this and the following section are drawn from U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States*, committee print, prepared by the Congressional Research Service, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1975), pp. 55-58.

## **Arguments in Favor of Strengthening Limitations on Debate**

### **Majority Rule**

The ability of a Senate minority to block actions supported by a clear majority thwarts one of the basic premises of American government, majority rule. Supporters of changing the system argue that it is undemocratic to allow a determined minority to prevent an institutional majority from working its will — the current process, they say, gives too much power to the minority at the expense of the majority. Further, they believe, it undermines public accountability of the majority, which is in charge of running the chamber, if they cannot get their agenda considered and passed by the Senate because of procedural problems.

### **Efficient Action**

The Senate is a legislative body and should be able to act on matters before it in a timely and efficient manner. Extended debate by one Senator or a small group of Senators is to waste time and money, supporters of changing debate rules argue, and brings public disrepute because the Senate cannot act in a timely fashion on important issues. Much legislation and several qualified nominations have been delayed or defeated by extended debate, they contend.

### **Speech Protected**

Changing the rules would not inhibit freedom of speech in the Senate. Current proposals to change the rules would provide those who oppose a bill or matter significant time to discuss the proposal, but would not allow them to block action on it if a majority of the Senate supported it. All a limitation on debate demands, supporters say, is the ability to have a fair up or down vote; it does not mandate a particular outcome.

## **Additional Points**

Other points raised during discussion of the cloture issue include the following:

- Some argue that a number of Senators might view proposed changes to the cloture rule as a diminution of their rights, by making it much more difficult to block confirmation of a nominee. As a result, if the rules change is adopted, it raises the question whether it would increase pressure to require Senate confirmation for more executive branch positions, so as to allow the Senate to retain a robust role in the confirmation process.
- The rule change proposed by the Frist and Miller resolutions would apply to all presidential nominations. Some have wondered whether nominations for the courts, the third branch of government, should

be treated the same as those to the executive branch or whether the two groups of nominations should have different thresholds for approval or different procedures for stopping debate.

- Could stronger enforcement of existing rules — such as the two speech rule — and disallowing informal but time consuming practices — such as suggesting the absence of a quorum — permit more efficient action on nominations or other matters? Is the greater use of filibusters a sign that traditional checks and balances in the nomination and confirmation system, such as the blue-slip which affords home-state Senators a great deal of say in selecting individuals for the federal bench, are no longer working as they were intended or have in the past?